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In the Supreme Court of the United States

October Term, 1982

MARILYN JOYCE SELLFORS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the willful violation by the Federal Aviation Administration of the project sponsorship requirements of the Airport and Airway Development Act of 1970, 49 U.S.C. §§1701 *et seq.*, which violation results in a failure to abate a known airport hazard on an airport being funded pursuant to that Act, gives rise to a cause of action under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680, for a death resulting directly from that hazard.

2. Whether the district court was clearly erroneous in its determination that the Federal Aviation Administration air traffic controllers on duty at the time of the accident in question were not negligent in failing to observe and warn the petitioner's deceased husband prior to takeoff of the existence of birds on or dangerously near the runway in operation.

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RECORD CITATION

The relevant portions of the Record are cited in this Petition as the Record was numbered for the appeal to the Eleventh Circuit Court of Appeals as follows:

Trial transcript (vols. 7-9, 13) is cited as R, Vol., page number.

No.

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MARILYN JOYCE SELLFORS,
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UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Marilyn Joyce Sellfors, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on February 16, 1983.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit in this case is found at 697 F.2d 1362. The opinion appears in Appendix A. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court below in an unpublished order on March 23, 1983 which appears in Appendix B. The issuance of the Mandate of the United States Court of Appeals has been stayed pending the outcome of the proceedings in this Court.

JURISDICTION

The opinion of the Court of Appeals for the Eleventh Circuit was entered on February 16, 1983. The Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 23, 1983. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date, in accordance with Rules 20.2 and 20.4 of the Rules of the Supreme Court of the United States and 28 U.S.C. §2101(c). This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

As provided by Supreme Court Rule 21.1(f), the verbatim quotations of the following statutory provisions are set forth in Appendix F hereto:

Federal Tort Claims Act, 28 U.S.C. §§2671-2680

Airport and Airway Development Act of 1970, 49 U.S.C. §§1711(4), 1714, 1718, 1727

STATEMENT OF THE CASE

This action was commenced by the petitioner, Marilyn Joyce Sellfors, in the United States District Court for the Northern District of Georgia, Atlanta Division, against the United States of America under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA"), to recover the value of the life of her deceased husband, Ernest F. Sellfors, who was killed on February 26, 1973, when the Lear Jet aircraft he was piloting crashed shortly after takeoff from

DeKalb-Peachtree Airport in Chamblee, Georgia. The crash of the aircraft was caused by a sudden loss of power during takeoff when the aircraft's engines ingested birds during its approach down the airport runway. The petitioner alleged that the negligence of the United States, through the Federal Aviation Administration ("FAA"), in failing to perform its statutory obligations under the Airport and Airway Development Act of 1970, 49 U.S.C. §§1701 *et seq.* ("AADA") and its predecessor statute, and the negligence of the FAA air traffic controllers on duty that morning in failing to observe and warn petitioner's husband of the presence of birds on or dangerously near the takeoff runway, were proximate causes of the death of the petitioner's husband. The basis for federal jurisdiction in the District Court was 28 U.S.C. §1346(b).

In 1969-70, the first birds began to appear at the DeKalb-Peachtree Airport. [R, Vol. 7, 56]. The number of birds present at the airport steadily increased between 1969 and the date of the accident. [R, Vol. 7, 56]. The source of the birds' attraction to the airport was a landfill located on county property adjacent to the airport owned and operated by DeKalb County. [R, Vol. 7, 57]. The county used the landfill to dump its residents' refuse and garbage [R, Vol. 7, 52, 54] and the landfill became a food source for the birds which congregated at the airport. [R, Vol. 7, 57].

DeKalb County was a recipient of federal funds under the AADA (and its predecessor statute), and the runway from which Ernest Sellfors took off on February 26, 1973 was constructed with funds received under this program. [R, Vol. 7, 34; R, Vol. 9, 245-46]. Under the program and AADA, in order for a sponsor (DeKalb County) to receive funds for airport development, the sponsor had to enter into

contracts with the FAA called grant agreements assuring the FAA that any existing hazard to air navigation present at its airport would be removed or mitigated, and that the creation of future hazards to air navagation would be prevented. [R, Vol. 9, 262].

The FAA local office responsible for obtaining and enforcing DeKalb County's compliance with its contractual assurances contained in the grant agreements became aware of the garbage dump and related bird problem in late 1969 or early 1970. [R, Vol. 8, 189-90]. The FAA was aware at that time that the bird problem was an airport hazard to air navigation as defined under the Act in question, 49 U.S.C. §1711 [R, Vol. 8, 197, 198; plaintiff's exhibit 38], and that the existence of this hazard posed a direct and substantial danger to human life. [R, Vol. 8, 241]. The FAA was aware and acknowledged that DeKalb County was in violation of its contractual assurances set out in the grant agreements. [R, Vol. 9, 272].

The FAA was also aware as early as 1971 that DeKalb County did not intend to close the landfill in question. [R, Vol. 9, 318, 320]. It was the county's position that garbage affected everyone and that the airport affected only a limited number of persons. [R, Vol. 7, 78]. Rather than enforce the grant agreements as required by law [R, Vol. 8, 242], *see* 49 U.S.C. §§1701 *et seq.*, the FAA local district office chose to allow DeKalb County to continue to operate the dump, as the local office determined that it was better for the public to leave the airport open. [R, Vol. 13, 806, 817]. In the instant case, the FAA not only failed to obtain the required assurances prior to disbursing funds to DeKalb County when the FAA was fully aware of the bird hazard [R, Vol. 8, 285], and of the fact that DeKalb County was not complying with the six grant agreements

involved [R, Vol. 8, 272], but in spite of these facts continued to find that DeKalb-Peachtree Airport *was* in compliance. [R, Vol. 8, 260-263]. Only after the accident in question, over three years from the time it became aware of the hazard in question, did the local FAA office take effective steps to mitigate the bird hazard in question. [R, Vol. 13, 826].

On May 5, 1980, a bench trial began before the Honorable William C. O'Kelley. At the conclusion of trial, the court ruled from the bench that the air traffic controllers were not negligent in failing to warn the petitioner's husband before takeoff of the birds, since there was no evidence presented that *they had sighted* any birds immediately prior to the accident. A copy of the transcript of the court's oral ruling is attached hereto as Appendix C.

On September 30, 1980, a written Order was handed down dismissing petitioner's action on the ground that any failure of the United States to perform its statutory requirements under the AADA did not create a legal duty actionable under the FTCA. A copy of the court's order is attached hereto as Appendix D. A copy of the judgment of the district court is attached hereto as Appendix E.

On February 26, 1983, a panel of the United States Court of Appeals for the Eleventh Circuit affirmed the holdings of the district court. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on March 23, 1983.

REASONS FOR GRANTING CERTIORARI

I. The Court Of Appeals' Holding That The Airport And Airway Development Act Does Not Give Rise To A Statutory Duty On The Part Of The United States Owed To Private Persons Using Federally Funded Airports, And That Therefore There Can Be No Cause Of Action Under The Federal Tort Claims Act When The Government Fails To Adhere To The Terms Of The AADA, Is In Conflict With This Court's Decision In Indian Towing Co. v. United States, 350 U.S. 61 (1955); And Presents A Conflict Among The Circuit Courts Of Appeals.

The Court of Appeals held that the Airport and Airway Development Act of 1970, 49 U.S.C. §§1701 *et seq.* ("AADA") does not give rise to a statutory duty on the part of the United States owed to private persons using federally funded airports, that there could be no liability on the part of the government pursuant to the Federal Tort Claims Act, 28 U.S.C. §§2671-2680 ("FTCA") because of its actions here because Georgia law recognizes no comparable private liability and that the Secretary of Transportation's omissions fell within the discretionary exception to the FTCA. 697 F.2d at 1365-1368.

A. The Court Of Appeals' Holding That The AADA Creates No Duty On The Part Of The United States Owed To Private Persons Using Federally Funded Airports Is In Conflict With This Court's Decision In Indian Towing Co. v. United States, 350 U.S. 61 (1955), With The Former Fifth Circuit's Own Opinion In Payton v. United States, 679 F.2d 475 (5th Cir. Unit B 1982) (en banc) And With The Ninth Circuit's Decisions In S.A. Empresa De Viacao Aerea Rio Grandense v. United States, 692 F.2d 1205 (9th Cir. 1982) And United Scottish Insurance v. United States, 692 F.2d 1209 (9th Cir. 1982).

In *Indian Towing Co. v. United States*, 350 U.S. 61, 64, 65 (1955), this Court ruled that the government could be held liable for its negligent operation of a lighthouse pursuant to the so-called "Good Samaritan" doctrine under the FTCA. The basis of the Court's decision in *Indian Towing* was the feeling that when the government undertakes to warn or protect the public from danger, and thereby induces reliance by the public on the government's actions, the government must perform its "Good Samaritan" duties in a careful manner.

Although there has been much debate since the *Indian Towing* decision on the subject of where the line of governmental liability is to be drawn, the cases of *Payton v. United States*, 679 F.2d 475 (5th Cir. Unit B 1982) (*en banc*); *S.A. Empresa De Viacao Aerea Rio Grandense v. United States*, 692 F.2d 1205 (9th Cir. 1982) and *United Scottish Insurance v. United States*, 692 F.2d 1209 (9th Cir. 1982) clearly demonstrate that the duty imposed on the FAA by the AADA which is the subject of this action is the type of duty the violation of which by the govern-

ment gives rise to a cause of action for damages under the FTCA.

The AADA authorizes the Secretary of Transportation to make grants for airport development by grant agreements with sponsors in order "to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics." 49 U.S.C. §1714(a).

Section 1718 of the AADA provides as follows:

> As a condition precedent to his approval of an airport development project under this subchapter, the Secretary *shall* receive assurances in writing, satisfactory to him, that—
>
> . . . (3) the aerial approaches to the airport will be adequately cleared and protected by removing, lowering, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;[1]
>
> . . .
>
> (4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft. . .

(Emphasis added).

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1. Airport hazard is defined in 49 U.S.C. §1711(4) as:

". . . any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in *landing* or *taking off* at such airport or is otherwise hazardous to such *landing* or *taking off* of aircraft." (Emphasis supplied).

The AADA empowers the Secretary of Transportation to perform such acts as may be necessary to carry out the provisions of the Act and insure the sponsor's compliance with these assurances. 49 U.S.C. §1727.

It is clear from the Act that Congress *required* the Secretary of Transportation to receive these assurances as a condition precedent to approval of an airport development project, that this requirement placed a duty on the Secretary to obtain such assurances and that this duty was a continuing one.

In deciding otherwise the Court of Appeals violated its *own* precedent established in the case of *Payton v. United States*, 679 F.2d 475, 482-83 (5th Cir. Unit B 1982) (*en banc*). *See Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*) (Precedents of Former Fifth Circuit are binding on Eleventh Circuit. "Unit B" of the Former Fifth Circuit consisted of the judges of the current Eleventh Circuit).

In *Payton*, the court held that the district court had jurisdiction of a count of the complaint brought under the FTCA alleging that the United States Bureau of Prisons failed to supply the United States Board of Parole with records showing that a federal prisoner who murdered plaintiffs' decedent while released on parole was a dangerous psychotic and a menace to society. The basis of this holding was former 18 U.S.C. §4208(c) which states: "It *shall* be the duty of the various probation officers and government bureaus and agencies to furnish the Board of Parole information concerning the prisoner, and, whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case." (Emphasis added). The court held that this statute placed a duty on the Bureau of Prisons to pro-

vide the Parole Board with the records in question, and that no discretion was involved. *Id.* at 482.

As did the statute in *Payton*, 49 U.S.C. §1718 clearly places a duty on the Secretary of Transportation to obtain the assurances set forth above. The only possible reason Congress would have required the Secretary to obtain these assurances is that Congress was concerned about the safety of the public using airports funded under the AADA. The Secretary's failure to obtain the proper assurances in this case clearly amounts to a violation of the duty imposed upon him by Congress pursuant to the AADA, which duty was unquestionably owed to private persons using the DeKalb-Peachtree Airport.

Furthermore, the holding of the court below that the Good Samaritan doctrine did not impose any liability on the government in this case because there was no evidence that petitioner's decedent relied upon these grant agreements to insure airport safety, or that he even had knowledge of the existence of the grant agreements, 697 F.2d at 1368, is in conflict with the recent decisions of *S.A. Empresa De Viacao Aerea Rio Grandense v. United States*, 692 F.2d 1205 (9th Cir. 1982) and *United Scottish Insurance v. United States*, 692 F.2d 1209 (9th Cir. 1982). In both of these cases, the Ninth Circuit held that under the California Good Samaritan rule an action would lie against the Government for the FAA's negligent inspection and certification of airworthiness of the aircraft involved in the respective cases.

In *S.A. Empresa, supra*, the court held that the United States, through the FAA, had voluntarily undertaken the inspection and certification of all civilian aircraft. 692 F.2d at 1208. The court noted that the Federal Aviation Act of 1958, 49 U.S.C. §§1301 *et seq.* provides for a mandatory certification procedure, and the FAA has established de-

sign criteria that every aircraft must meet before being certified for flight. *Id.* The court then noted:

> "Members of the flying public may not know the specific contents of the FAA regulations. There is genuine knowledge, however, that regulations designed to insure optimum safety exist and that the United States inspects each aircraft for compliance. . . . *The United States should expect that members of the public will rely on the proper performance by the FAA of its duty to inspect and certify.* . . . The voluntary assumption of the inspection and certification function carries with it the duty to inspect and certify with reasonable care."

Id. (Emphasis added).

In *United Scottish Insurance, supra,* the court stated that "the FAA's regulatory activities are performed for the public as a whole. *When voluntarily performing activities solely for the safety of the public, the FAA performs a service for others.* . . . [T]he relationship FAA inspectors have with pilots, owners, and passengers is imbued with reliance. The United States, until it voluntarily undertook to do so, had no duty to occupy the field of aircraft inspection and certification. Having chosen to make aircraft safety inspections and to certify the results, the government reasonably could expect that members of the public would rely on the government's cerification of airworthiness." 692 F.2d at 1211 (emphasis added).

The analysis of these two Ninth Circuit decisions clearly applies to the duties imposed upon the FAA inspectors by the AADA regarding the grant agreements in question here. Therefore, the Eleventh Circuit's holding that the AADA did not impose a duty upon the government to assure that airports funded pursuant to the AADA were safe, and the court's holding that there could have

been no reliance by the petitioner's decedent on the government to fulfill its duty under the Act, are clearly in conflict with the decisions discussed above.

B. The Circuit Court's Holding That Georgia Law Does Not Recognize A Cause Of Action Under Which The Government Would Be Liable In This Case Is In Conflict With This Court's Decision In Indian Towing, Is In Conflict With Georgia Law, And Is In Conflict With The Ninth Circuit's Decisions In S.A. Empresa And United Scottish Insurance.

The court below incorrectly ruled that Georgia law does not recognize a comparable private liability in situations such as that which existed in this case.

The court's decision on this issue was based on two findings. The first stated that Georgia law "has consistently held that municipalities are not liable for the negligence of their officers in the performance of governmental functions." 697 F.2d at 1367. This finding by the court below is totally inapposite to a decision under the FTCA, and is in direct conflict with this Court's decision in *Indian Towing*.

In *Indian Towing*, this Court noted that "the government in effect reads the FTCA as imposing liability in the same manner as if it were a municipal corporation and not as if it were a private person, and it would thus push the court into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." 350 U.S. at 65. This Court held that "[t]he fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity. *The Fed-*

eral Tort Claims Act cuts the ground from under that doctrine; it is not self-defeating by covertly embedding the casuistries of municipal liability for tort." Id. (emphasis added). *See also, United States v. Muniz*, 374 U.S. 150 (1963).

Thus it is clear that the Eleventh Circuit's decision on this point was based on an analysis that has been wholly discredited by this Court.

The second portion of the holding of the court below on this issue centered on a finding that the Good Samaritan doctrine, as enunicated in Restatement (Second) of Torts §323 (1965), did not apply to the government's actions in this case.[2] 697 F.2d at 1367-68.

In so holding, the Eleventh Circuit ignored that portion of the Good Samaritan rule which does apply, i.e. Restatement (Second) of Torts §324A, regarding liability to a *third person* for negligent performance of an undertaking. Section 324A provides:

> "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or

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2. Section 323 provides: One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm or (b) the harm is suffered because of the other's reliance upon the undertaking.

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Section 324A was specifically adopted by the Supreme Court of Georgia as the law of that state in *Huggins v. Aetna Casualty & Surety Co.*, 245 Ga. 248, 249, 264 S.E.2d 191 (1980). Thus, the lower court's holding that Georgia law does not provide for a cause of action under these circumstances is in direct conflict with the holdings of the Georgia Supreme Court.

Furthermore, California's Good Samaritan doctrine, which also consists of §§323 and 324A, was the basis of the findings by the Ninth Circuit in *S.A. Empresa, supra,* and *United Scottish Insurance, supra,* that a duty of care for the government to private persons existed under state law, the violation of which by the government in those cases provided a basis for liability under the FTCA.

Thus, the Eleventh Circuit's holding on this point was clearly in violation of this Court's decision in *Indian Towing,* contrary to Georgia law, and in conflict with the law of the Ninth Circuit on this very issue. Therefore, certiorari should be granted in this case.

C. The Eleventh Circuit's Decision That The Secretary's Actions In This Case Fell Into The Discretionary Exception To The FTCA Is In Direct Conflict With The Law Of The Fifth Circuit.

As shown above, the language of the statute and the holding of the *Payton* case clearly indicate that the duty which the Secretary negligently failed to perform in this case was non-discretionary. Section 1718 of the AADA

plainly *requires* the Secretary to obtain the assurances discussed above as a condition precedent to the approval of a project under the Act. While the method by which the Secretary attempts to obtain these assurances may be discretionary, there is no discretion as to whether they will be obtained, and his failure to obtain them at all clearly constitutes a negligent act. As the Fifth Circuit has held:

> ". . . the fact that the negligence may have occurred in connection with a discretionary function does not make the negligent act a discretionary function. Nor does the discretionary character of the government's initial safety undertaking govern whether a duty can arise out of those undertakings. The Tort Claims Act deals with sovereign immunity—that is, with whether the United States may be sued for certain torts; it does not define what are torts."

Aretz v. United States, 604 F.2d 417, 431 n.18 (5th Cir. 1979), *reh'g granted en banc*, 616 F.2d 254, *questions certified to Georgia Supreme Court*, 635 F.2d 485, *certified questions answered*, 248 Ga. 19, 280 S.E.2d 345 (1981), *panel decision reinstated*, 660 F.2d 531 (5th Cir. 1981). *Accord, Payton, supra*, 679 F.2d at 480.

In *Aretz*, the Fifth Circuit upheld a finding that the United States was negligent under Georgia law in that Army officials placed intensely flammable illuminate compounds into the wrong hazard classification pigeonhole, and thereafter failed to inform a defense contractor that worked with the compounds of a change in classification in accordance with standard operating procedure. 604 F.2d at 430. The court held that such a finding did not amount to the improper creation of a duty on the part of the United States to supervise and inspect the day-to-day manufacturing process of its defense contractors. *Id.* In

addition to the rejection of the government's discretionary function argument discussed above, the court also held that it is the kind of negligence, not the kind of activity pursued, that is the test for determining the liability of the United States under the FTCA. *Id.*

In the instant case, the FAA not only failed to obtain the required assurances prior to disbursing funds to DeKalb County when the FAA was fully aware of the bird hazard [R, Vol. 8, 285], and of the fact that DeKalb County was not complying with the six grant agreements involved [R, Vol. 8, 272], but in spite of these facts continued to find that DeKalb-Peachtree Airport *was* in compliance. [R, Vol. 8, 260-263].

Judged by the standards of the Fifth Circuit's holdings in *Payton* and in *Aretz,* and the language of the statute itself, it is clear that the Eleventh Circuit's holding that the Secretary's actions fell into the discretionary exception to the FTCA was in error. The failure of the court below even to mention *Payton* and *Aretz,* which are binding precedents on that court, demonstrates that certiorari should be granted in this case.

II. The Holding Of The Court Below That The Air Traffic Controllers Were Not Negligent Is In Direct Conflict With The Decisions Of The Supreme Court Of Georgia And With The Decisions Of Other Federal Courts Of Appeals On The Same Issue.

The court below affirmed the trial judge's finding that the air traffic controllers were not negligent in failing to warn Mr. Sellfors of the bird hazard prior to the takeoff of Mr. Sellfors' airplane because there was no evidence that the air traffic controllers had sighted any birds immediately prior to the accident. 697 F.2d at 1365.

This decision is in conflict with the holdings of the courts of Georgia and with other federal courts of appeals which have addressed similar fact situations, and is clearly erroneous.

Petitioner argues that the fact that the air traffic controllers did not sight any birds prior to the accident, when birds were in fact present, and when those air traffic controllers had taken it upon themselves to warn pilots if and when there *were* birds present, is evidence that the controllers were negligent. The controllers' *failure to see the birds,* especially the ones that caused the crash, is the foundation of negligence upon which the liability for failure to warn rests.

Under Georgia law, "[n]egligence is predicated on what *should have been anticipated* rather than on what happened." *Delta Air Lines, Inc. v. Garmon,* 139 Ga. App. 146, 149, 227 S.E.2d 816 (1976) (emphasis supplied). The issues should not be whether one saw something, but rather whether one could and should have seen it. *See Ellington v. Tolar Construction Co., Inc.,* 237 Ga. 235, 227 S.E.2d 336 (1976). To hold otherwise would allow one whose duty it is to see to escape liability by simply stating, as was the case here, that he did not see. Federal courts, in cases involving the FTCA, have stated that under Georgia law, foreseeability is "talismanic" for purposes of determining whether there has been a breach of a duty of care. *See e.g., Williams v. United States,* 352 F.2d 477, 481 (5th Cir. 1965).

The evidence at trial was clear that the air traffic controllers had taken it upon themselves to warn pilots of the presence of birds on or near the runways because of the great danger those birds posed to aircraft. There can be no doubt that "[o]nce the Government undertakes to provide services otherwise not required of it, those

services must be performed in the exercise of due care and the Government will be liable for injuries shown to have been proximately caused by the lack of such care. . . . This principle applies fully to the federal air traffic control system which has been developed at the command of Congress . . . and which has as its purpose the promotion of the 'safe, orderly and expeditious flow of air traffic'." *Delta Air Lines, Inc. v. United States,* 561 F.2d 381, 389 n.4 (1st Cir. 1977), *cert. denied,* 434 U.S. 1064 (1978).

Applying this principle to the facts of this case, there can be no doubt that the air traffic controllers were negligent in failing to ascertain that there was a flock of birds on or near the runway in question, which flock was large enough to bring down a jet airplane.

The cases are legion from other federal courts, including the Fifth Circuit whose cases are binding precedent on the court below, on the issue of the duty of air traffic controllers to warn of dangers reasonably apparent to them, but not apparent, in the exercise of due care, to the pilot. *See e.g., Delta Air Lines, Inc. v. United States, supra; Gill v. United States,* 429 F.2d 1072 (5th Cir. 1970); *Ingham v. Eastern Air Lines, Inc.,* 373 F.2d 227 (2nd Cir. 1967), *cert. denied,* 389 U.S. 931 (1967). *See also, Pierce v. United States,* 679 F.2d 617 (6th Cir. 1982).

In *Ross v. United States,* 640 F.2d 511 (5th Cir. Unit B 1981), the Fifth Circuit affirmed, *inter alia,* the holding of the United States District Court for the Southern District of Alabama, that an air traffic controller's transmittal of incorrect altitude data was negligent. In that decision, the lower court held that the duty of the air traffic controller of giving the Minimum Descent Altitude (MDA) *"voluntarily undertaken by the controller carries with it the attendant duty to give the correct MDA figure."* 640

F.2d at 519 (emphasis added). The court held that the air traffic controller who transmitted the incorrect MDA to the pilot "breached that inherent duty." *Id.* *See also, Gill v. United States, supra,* 429 F.2d at 1075 (duty of the United States to airplane pilot requires, in appropriate circumstances, *due care* in providing both current weather information and weather forecast).

In *Moloney v. United States,* 354 F.Supp. 480 (S.D. N.Y. 1972), a landscape gardener employed by an airport operator instituted an action against an airline and the United States for injuries sustained when he was struck by a jet blast from an airplane. The district court, although finding that the plaintiff could not recover because of his contributory negligence, held that it "was the duty of tower operators *to inform themselves of dangers on or near runways and to communicate this information to aircraft or to refuse clearance until the runway was known to be clear.*" *Id.* at 483 (emphasis added). *See also, Maryland v. United States,* 257 F.Supp. 768, 775 (D.D.C. 1966) (air traffic controllers "were guilty of actionable negligence *in failing to observe sufficiently*" the presence of a government jet airplane in the vicinity of a commercial aircraft, and in failing *to transmit timely warning of its presence* to the pilot of the commercial aircraft) (emphasis added); *Harris v. United States,* 333 F.Supp. 870 (N.D.Tex. 1971).

These cases clearly demonstrate that the air traffic controllers in the instant action failed in their duty to use "due diligence" to inform themselves of the bird hazard on or near the runway in question, and to communicate this information to Mr. Sellfors, or to refuse clearance until the runway was known to be clear. This breach of duty by the air traffic controllers was obviously a proximate cause of the accident in question.

Although the court below noted that Mr. Sellfors was fully aware of the hazardous situation regarding birds at the DeKalb-Peachtree Airport, 697 F.2d at 1364, the district court specifically held that "there was no evidence of negligence on the part of the pilot in failing to observe any birds. Certainly he was not in as good a position to observe birds as were the air traffic controllers." [R, Vol. 16, 1004].

Thus it is clear that the court below applied the wrong standard of care in judging the actions of the air traffic controllers. Rather than finding that the controllers were not negligent in failing to warn Mr. Sellfors of the bird hazard, the air traffic controllers should have been found to have been negligent for failing properly to carry out their duty in observing the bird hazard prior to the fatal takeoff. Therefore, the decision of the court below was clearly erroneous, and in direct conflict with the relevant state law and the law as it has been expounded in the Fifth Circuit and other federal courts of appeals and district courts. For these reasons, certiorari should be granted in this case.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

ROBERT W. PATRICK
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CERTIFICATE OF SERVICE

I, E. A. Simpson, Jr., do hereby certify that I have this day served the within and foregoing Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit by causing the mailing of three copies thereof to counsel of record in envelopes properly stamped and addressed as follows:

Cecile Hatfield
U.S. Department of Justice
550 Eleventh Street, N.W.
Todd Building, Room 906-B
Washington, D.C. 20530

This 28 day of April, 1983.

E. A. SIMPSON, JR.
Attorney for Petitioner

APPENDIX

APPENDIX A

Marilyn Joyce SELLFORS, Etc.,
Plaintiff-Appellant,

v.

UNITED STATES of America,
Defendant-Appellee.

No. 80-7897.

United States Court of Appeals,
Eleventh Circuit.

Feb. 16, 1983.

Pilot's widow brought action against the United States to recover damages due to the loss of life of her husband who was killed when the engines of the aircraft he was piloting ingested birds on take-off. The United States District Court for the Northern District of Georgia, William C. O'Kelley, J., dismissed the cause of action, and plaintiff appealed. The Court of Appeals, Pittman, District Judge, sitting by designation, held that: (1) evidence sustained finding that air traffic controllers were not negligent in failing to warn pilot of presence of birds prior to take-off; (2) the Airport and Airway Development Act does not give rise to a statutory duty on the part of the United States owed to private persons using federally funded airports; and (3) failure of air traffic controllers to warn pilot of hazardous condition caused by birds near runway did not constitute a common-law tort cognizable under Georgia law.

Affirmed.

1. Aviation (Key) 235

In Federal Tort Claims Act suit by pilot's widow arising out of air crash which occurred when aircraft's engines ingested birds upon take-off, evidence sustained finding that air traffic controllers had not sighted any birds immediately prior to the accident and thus were not negligent in failing to warn pilot of the birds prior to take-off. 28 U.S.C.A. §§ 1346(b), 2671-2680.

2. United States (Key) 78(3)

In determining whether Federal Tort Claims Act waives sovereign immunity of the United States, the determining factor does not consist of a duty arising from a statute, but whether a private person would be liable under state law for the same acts or omissions; the Act was not intended to redress breaches of federal statutory duties. 28 U.S.C.A. § 1346(b).

3. Aviation (Key) 232.5

The Airport and Airway Development Act does not give rise to a statutory duty on the part of the United States owed to private persons using federally funded airports. Airport and Airway Development Act of 1970, § 2 et seq., 49 U.S.C.A. § 1701 et seq.

4. Municipal Corporations (Key) 745½

Georgia law has consistently held that municipalities are not liable for the negligence of their officers in the performance of governmental functions. Ga.Code, § 69-307.

5. Federal Courts (Key) 431

Even though violation of a federal statutory duty does not automatically invoke state law principles of negligence

per se, where the government, in performance of such duties, does act negligently, liability may be found under state law because of the relationship created: the good samaritan doctrine.

6. Negligence (Key) 2

Under Georgia law, where one does not create the dangerous condition and takes no remedial measures, he is not liable as a good samaritan.

7. Aviation (Key) 232.5

The failure of air traffic controllers to warn pilot of hazardous condition caused by birds near runway did not constitute a common-law tort cognizable under Georgia law, since federal funding of the airport, standing alone, did not link the Federal Aviation Administration to creation of the hazardous condition, and there was no evidence that pilot relied upon grant agreements entered between county and FAA to insure airport safety.

8. United States (Key) 78(12)

Secretary of Transportation was acting as a governmental policy-maker in his decision to apply negotiation and diplomacy rather than legal measures in an attempt to alleviate hazardous condition caused by the presence of birds in close proximity to airport runway, and therefore, the Secretary's alleged omissions fell within the discretionary exception to the Federal Tort Claims Act. 28 U.S.C.A. § 2680(a).

Robert W. Patrick, Gary M. Cooper, E.A. Simpson, Jr., Atlanta, Ga., for plaintiff-appellant.

Cecile Hatfield, U.S. Dept. of Justice, Washington, D.C., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before RONEY and KRAVITCH, Circuit Judges, and PITTMAN,* District Judge.

PITTMAN, District Judge:

This action was commenced by the appellant, Marilyn Joyce Sellfors, against the United States of America under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. §§ 1346(b), 2671-80, for damages due to the loss of life of her husband, Ernest F. Sellfors, who was killed on February 26, 1973, when the Lear Jet aircraft he was piloting crashed shortly after take-off from the DeKalb-Peachtree Airport in Chamblee, Georgia. The crash resulted from a sudden loss of power during take-off when the aircraft's engines ingested birds on the take-off from the runway. The source of the birds' attraction to the vicinity was a county landfill situated adjacent to the runway on county property.

Appellant alleges that the United States was negligent, through the acts or omissions of its agent, the Federal Aviation Administration (FAA), in failing to perform claimed statutory obligations under the Airport and Airway Development Act of 1970, 49 U.S.C.A. §§ 1701 *et seq.* (AADA). Appellant also alleges negligence on the part of the FAA air traffic controllers on duty at that time in failing to observe and warn her husband of the presence of birds in close proximity to the runway.

At the conclusion of the trial, the judge ruled from the bench that the air traffic controllers were not negligent in failing to warn the deceased pilot of the birds

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*Honorable Virgil Pittman, U.S. District Judge for the Southern District of Alabama, sitting by designation.

prior to take-off. The court found that there was no evidence presented that the controllers had sighted any birds immediately prior to the mishap. The district court subsequently issued a written order dismissing the cause of action finding that the AADA obligations would not support a claim under the FTCA. It is from these rulings that the plaintiff-appellant appeals.

We affirm.

[1] DeKalb County, Georgia is the owner and operator of both the airport and the contiguous landfill. The county airport was a recipient of federal funds under the AADA and the runway from which the ill-fated aircraft took off was constructed with such funds. As a statutory prerequisite to receiving funds for airport development, the sponsor entered into some six contracts (grant agreements) with the FAA assuring the agency that any existing hazards to air navigation present at the airport would be eliminated or corrected. The grant agreements further promised that future hazards would be prevented.

The first birds appeared at the airport in 1969. Their number has increased each year, becoming most plentiful in the winter months. Flocks of great numbers of these birds have been sighted from time to time alongside and flying across the runways. The record reflects FAA knowledge of the hazard in 1972. The agency conducted investigations, negotiated with the county and applied friendly coercion in an attempt to eliminate the problem.

The deceased pilot was fully aware of the hazardous situation regarding birds at the DeKalb-Peachtree Airport as it was his home base. The fatal crash occurred on Mr. Sellfors second flight from the airport that day. Additionally, the aviation flight charts (Jeppeson charts) in Mr. Sellfors' possession when he crashed contained a warning of danger from birds.

At approximately 9:00 a.m. the day of this crash, birds were sighted in the grass adjacent to Runway 16. The air traffic controllers, as well as the airport manager, were alerted to their presence.

The manager, using a shotgun, managed to kill or frighten off these birds. While out on the airport perimeter he inspected the active Runway 20 left and observed no birds near that runway. The tower reported seeing no birds in that area at any time on that morning.

There was substantial activity on Runway 20 left throughout the morning and at no time were there reports of bird sightings in that area. The pilot which preceded Mr. Sellfors testified that he saw a small flock of birds in the grass alongside the left or eastern edge of Runway 20 left, but did not report this to the tower. The location he described was approximately 1000-1500 feet from the control tower and about one-half mile from Mr. Sellfors, awaiting on the taxi pad. Another aircraft landed before Mr. Sellfors began his take-off. The pilot of that plane did not report seeing birds.

The trial judge, in his order of September 30, 1980, found that there was no evidence that the air traffic controllers had sighted any birds immediately prior to the accident. These findings will not be disturbed unless clearly erroneous. *North River Energy Corp. v. U.M.W.A.*, 664 F.2d 1184 (11th Cir. 1981). A thorough review of the evidence in this case did not reveal anything to dispute the above findings. The substantial evidence, in fact, provides clear support that the air traffic controllers were not negligent in failing to warn Mr. Sellfors of the hazard.

The court next addresses appellant's contentions as to the liability of the FAA for failing to enforce compli-

ance of the county's contractual assurances entered into pursuant to the AADA. A particular subsection of the Act directs the Secretary of Transportation to obtain assurances from the government entity seeking federal airport development funds that existing hazards to air navigation will be removed and that further hazards will not thereafter be established.[1]

The United States contends that the FAA owed no duty of care towards the appellant's husband as a result of the requirements of this statute, but that even if such a duty did exist, the acts or omissions complained of fall within the discretionary function exception to the FTCA. 28 U.S.C.A. § 2680(a). *See generally* Annot., 47 A.L.R. Fed. 85 (1980), *see also Hawaiian Airlines, Inc. v. United States,* No. 80-170-ORL-CIV-Y, slip op. (M.D.Fla. May 7, 1981); *Safeco Ins. Co. v. United States,* No. 81-1015, slip op. (N.D.S.D. Dec. 31, 1981).

Section 1346(b) of the FTCA waives the sovereign immunity of the United States for injuries

> caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under

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1. Section 1718, last paragraph, provides, in part:

> To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, *as he considers necessary. Among other steps to insure such compliance* the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. (emphasis added).

Airport hazard is defined as:

> [A]ny structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing and takeoff of aircraft.

49 U.S.C.A. § 1711.

> circumstances where the United States, *if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.*

See Brown v. United States, 653 F.2d 196, 201 (5th Cir. Unit A 1981).

[2] The district court correctly held that the determining factor does not consist of a duty arising from a statute, but whether a private person would be liable under Georgia law for the same acts or omissions. The FTCA was not intended to redress breaches of federal statutory duties. *See Baker v. F & F Investment Co.,* 489 F.2d 829, 835 (7th Cir.1973); *Devlin Lumber & Supply Corp. v. United States,* 488 F.2d 88, 89 (4th Cir. 1973); *Davis v. United States,* 395 F.Supp. 793, 795 (D.Neb.1975), *affirmed per curiam,* 536 F.2d 758 (8th Cir.1976). As further support, the Supreme Court has determined that Congress, in drafting the FTCA, was concerned primarily with providing redress for the garden variety common law torts recognized by state law. *See Dalehite v. United States,* 346 U.S. 15, 28, 73 S.Ct. 956, 97 L.Ed.2d 1427, (1953). *See also United States v. Smith,* 324 F.2d 622, 624-25 (5th Cir.1963).

The analysis herein involves two separate inquiries: (1) does the AADA of 1970 create a statutory duty on the part of the United States owing to third parties using federally funded airports and (2) do the acts or omissions complained of constitute a common law tort cognizable under state law?

[3] The AADA was passed for the principal purpose of providing "for the expansion and improvement of the Nation's airport and airway system." 1970 U.S. Code Cong. & Ad.News 3047, 49 U.S.C.A. § 1701. This

was necessitated by the burgeoning United States economy and population which suffered from the lack of a national system of adequate airport facilities. *Id.* at 3049-59, 3083. Neither the legislative history nor the AADA itself reflects any congressional intent that the Act create duties on the part of the federal government owing to private individuals using sponsored airport facilities. The purpose of the Act is to provide federal funds for use in developing and modernizing airports and related facilities in conjunction with a national transportation policy and other national concerns of efficient and nondiscriminatory use of such monies. It was not intended to regulate the operation of airports. *City of Dallas, Texas v. Southwest Airlines Co.*, 371 F.Supp. 1015, 1024-25 (N.D.Tex. 1973), *affirmed* 494 F.2d 773 (5th Cir.), *cert. denied*, 419 U.S. 1079, 95 S.Ct. 668, 42 L.Ed.2d 674 (1974).

The legislative history shows no intent of Congress to impose a legal duty on the FAA, running to each user of a federally funded airport, to insure the absolute safety of each facility constructed or maintained with federal funds. The Supreme Court has not considered the issue. In *Miree v. DeKalb County*, 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977), plaintiffs claimed that the Airport and Airway Development Act of 1970 provided an implied civil right of action to recover for death or injury due to violation of the Act. The Court declined to consider the argument because it had not been pleaded, argued or briefed before the district court or the Court of Appeals. The Court noted, "The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit . . . ." 433 U.S. at 33, 97 S.Ct. at 2495. *See Miree v. United States*, 588 F.2d 453 (5th Cir. 1979) (under Georgia law, survivors of air crash victims could not maintain suit against county as third-party beneficiaries of contract between county and the Federal

Aviation Administration); *Obenshain v. Halliday,* 504 F.Supp. 946, 956 (E.D.Va.1980) (plaintiff denied standing to sue United States as a third-party beneficiary of a grant-in-aid contract issued pursuant to Federal Aviation Act, 49 U.S.C.A. §§ 1301 *et seq.*)[2]

Appellant cites *Rapp v. Eastern Airlines, Inc.,* 264 F.Supp. 673 (E.D.Pa.), *affirmed* 399 F.2d 14 (3rd Cir. 1967), *cert. denied* 393 U.S. 979, 89 S.Ct. 446, 21 L.Ed.2d 439 (1968), *vacated without opinion and by agreement* 521 F.2d 1399 (3rd Cir.1970), as support for the proposition that the failure by the United States to require an airport authority to remove a garbage dump creating a bird hazard raises a cause of action under the AADA. *Rapp* was not brought under the FTCA, but was jurisdictionally based on the Suits in Admiralty Act, 46 U.S.C.A. §§ 741-752. Therefore, *Rapp* did not consider whether the Airport and Airway Development Act created a duty to airport users which could be enforced against the United States under the Federal Tort Claims Act. "Any action brought pursuant to the [FTCA] Act must meet the Act's particular statutory prerequisites for government liability." *United Scottish Ins. Co. v. United States,* 614 F.2d 188, 191-92 (9th Cir.1979). In addition, *Rapp* was vacated and has no precedential value. *See O'Connor v. Donaldson,* 422 U.S. 563, 577 n. 12, 95 S.Ct. 2486, 2495 n. 12, 45 L.Ed. 2d 396 (1975). At the most, the *Rapp* holding would only be persuasive. But the *Rapp* court gave no legal basis for its conclusion so that it is of no value in deciding this case.

Appellant also relies on *Starr v. United States,* 393 F.Supp. 1359 (N.D.Tex.1975), arising under the FTCA

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2. The AADA was preceded by and amends portions of the Federal Aviation Act of 1958, 49 U.S.C.A. §§ 1301 *et seq.* 1970 U.S.Code Cong. & Ad.News 3047, 3117-18.

and the Federal Aviation Act, 49 U.S.C.A. §§ 1301 *et seq.* The status of the FAA and the airport in *Starr* was distinguishable from the case *sub judice*. The federal assistance involved therein did not consist of receiving federal monies. To be sure, the district court in *Starr* found this distinction to be dispositive and distinguished the facts before it from those in *Rapp*. *Id.* at 1365.

Having distinguished *Rapp* and finding no government liability the *Starr* court stated:

> The F.A.A. can exercise penal enforcement powers against an airport owner when such airport is the recipient of federal subsidies, which were granted pursuant to the Airport and Airway Development Act of 1970.

Id. (footnote omitted). The statement was unnecessary to the determination of that case. This Court's reading of the AADA and its legislative history does not reveal any basis for such a statement.

We hold, therefore, that the AADA does not give rise to a statutory duty on the part of the United States owed to private persons using federally funded airports. *Cf. Zabala Clemente v. United States,* 567 F.2d 1140 (1st Cir.1977), *cert. denied,* 435 U.S. 1006, 98 S.Ct. 1876, 56 L.Ed.2d 388 (1978) (FAA not liable by way of a self-assumed duty to inspect for failure to warn that plane was overweight and lacked a proper flight crew). The First Circuit reasoned in *Zabala Clemente v. United States,* 567 F.2d at 1149:

> The cases we have just considered turned on the lack of direct statutory authority for the existence of a federal duty of care to a particular class of individuals. It should be noted that even where specific behavior of federal employees is required by statute, liability to the beneficiaries of that statute may not be founded on

the Federal Tort Claims Act if state law recognizes no comparable private liability.

In ascertaining whether Georgia law would impose liability on private persons under the facts before us, we must first reject appellant's insistence upon automatically applying the state negligence per se law. *United Scottish Ins. Co. v. United States,* 614 F.2d 188, 192 (9th Cir.1979), *accord, Blessing v. United States,* 447 F.Supp. 1160, 1186 n. 7 (E.D.Pa.1978).

Georgia law does not recognize a comparable private liability. In *Miree v. United States,* 242 Ga. 126, 249 S.E.2d 573 (1978), a jet crashed because it had ingested birds swarming over an airport and adjacent county garbage dump. The Georgia Supreme Court held that private users of the airport were not "third party beneficiaries" of an agreement between the county and the Federal Aviation Administration. "The mere fact that a member of the public would have benefited from the performance does not create third party intended beneficiary status under Georgia law." 249 S.E.2d at 580.

[4] Georgia law has consistently held that municipalities are not liable for the negligence of their officers in the performance of governmental functions. Ga.Code Ann. § 69-307(1967); *Greenway v. Thompson,* 368 F.Supp. 387 (D.C.Ga.1973); *Poole v. City of Louisville,* 107 Ga.App. 305, 130 S.E.2d 157 (1963).

[5] Even though violation of a federal statutory duty does not automatically invoke state law principles of negligence per se, where the government, in the performance of such duties does act negligently, liability may be found under state law because of the relationship created: the good samaritan doctrine. *See Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955).

[6] The good samaritan doctrine, as enunciated in Restatement (Second) of Torts § 323 (1965),[3] has been adopted by the Georgia courts. The interpretations of the doctrine have uniformly held that where one does not create the dangerous condition and takes no remedial measures, he is not liable as a good samaritan. *Cook v. Parrish,* 105 Ga.App. 95, 123 S.E.2d 409 (1961). Federal funding, standing alone, does not link the FAA to "creation" of the hazardous landfill. By entering into the grant agreements with DeKalb County, the FAA did not cause to exist the dangerous condition nor did such act in any manner increase the risk of harm to persons using the airport. Furthermore, there is no evidence that the pilot Sellfors relied upon these grant agreements to insure airport safety. In fact, the record does not reflect that Mr. Sellfors even had knowledge of the existence of the grant agreements.

[7] The lack of proof of the necessary elements of the good samaritan doctrine leads this Court to conclude that no cause of action exists under Georgia law. The FTCA is therefore inapplicable.

[8] As an alternative defense the government argues that the omissions involved fall within the discretionary exception to the FTCA. 28 U.S.C.A. § 2680(a). As the Supreme Court said in *Dalehite,* "[w]here there is room for

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3. Section 323 provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

policy judgment and decision there is discretion." 346 U.S. at 36, 73 S.Ct. at 968. Assuming, *arguendo*, that the FAA possessed the power to enforce compliance with its grant agreements, the Secretary was acting as a governmental policy-maker in his decision to apply negotiation and diplomacy rather than legal measures. Weighing the the governmental interest in insuring the most efficient use of federal funds against such remedies as closing down the airport or instituting other legal sanctions and deciding in favor of a less antagonistic approach clearly constitutes the type of discretion reflected in the history of the FTCA. *See e.g., Miller v. United States*, 378 F.Supp. 1147 (E.D.Ky.1974), *affirmed*, 522 F.2d 386 (6th Cir.1975) (no tort liability for failure to promulgate stricter air safety regulations); *Smith v. United States*, 375 F.2d 243 (5th Cir.1967) (refusal of Attorney General to bring suit for violation of federal statute within discretionary function exception).

The decision of the district court is hereby AFFIRMED.

APPENDIX B

(Filed March 23, 1983)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-7897

MARILYN JOYCE SELLFORS, ETC.,
Plaintiff-Appellant,

versus

UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal From the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion February 16, 11 Cir., 1983, ... F.2d .....).

(March 23, 1983)

Before JUDGES RONEY and KRAVITCH, Circuit Judges, and JUDGE PITTMAN, Senior Judge.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Entered for the Court:

/s/ Paul H. Roney
United States Circuit Judge

APPENDIX C

ORAL RULINGS OF DISTRICT COURT, MAY 5, 1980

[R, Vol. 16, 995-1010]

[995] THE COURT: This is a case that involves the loss of human life, that is, the pilot of a Learjet aircraft on February 26, 1973, while in takeoff from Peachtree-DeKalb Airport.

The suit is brought by Marilyn Joyce Sellfors as the widow of Earnest Sellfors, the pilot of the aircraft.

The lawsuit is brought against the United States of America only as far as this trial is concerned. The Plaintiff contends that the Government through its air traffic controllers was negligent in many respects, but essentially in that they failed to warn the pilot of the aircraft of the hazard of birds on the field on that morning or that in the alternative that they should have seen birds and have warned him or that they saw birds and did not warn him.

They further contend there is negligence in their failure to assure that the dangerous condition existing by the construction and maintenance by DeKalb County of a sanitary landfill or garbage dump on the airport premises [996] was also negligence.

To the contrary, the Government essentially contends that there was no negligence on the part of the Government agents or employees, and to the contrary, the crash and death of Mr. Sellfors was the result of the negligence of the pilot himself.

I am going to make some preliminary findings that I may modify later, but go ahead and get as many of the matters and the general tenor of the case as I see it on the record at this time.

In the Court's judgment, I ruled several years ago that DeKalb County, who at that time was a named defendant in many of these cases, could not be pursued as a defendant because of governmental immunity. That decision has been appealed and affirmed by the Fifth Circuit Court of Appeals, the Supreme Court of the United States and the Georgia Supreme Court, seriatum.

The Court is convinced that at least in this case DeKalb County and its officers certainly created at best what might be called an attractive nuisance in maintaining a [997] landfill, sanitary landfill and garbage dump immediately adjacent to the principal jet runway of Peachtree-DeKalb Airport. Their negligence was not only passive negligence but was active and deliberate, and in my judgment, was action of the County with an absolute disregard for human life.

Now, that negligence is not necessarily imputable to the United States Government. I have heard evidence here that the County Commissioners stated there were more people concerned about garbage than were concerned about airplanes, and that statement in and of itself demonstrates a disregard for aviation safety and disregard for human life; irregardless of that, DeKalb County is immune under the laws of this state.

I believe that I told the parties in an initial conference in this case many years ago, when I made the initial ruling, that governmental immunity may have outlived its useful purpose, but it was the law of the State of Georgia and I was bound to follow that law and I did.

Now, we must pass then from the [998] responsibility of DeKalb County in regard to this matter and determine the responsibility, if any, of the United States Government.

DeKalb County began to develop this landfill or garbage dump at some time prior to 1969. At least by 1969

it had become a serious problem and it compounded itself apparently each year thereafter until in 1972, the winter of '72, January of '72, there was at least a serious bird strike that occurred which the FAA investigated and there were numerous conferences that took place concerning birds and issues made concerning the safety of Peachtree-DeKalb Airport.

I believe that the facts are certainly irrebuttable, that the landfill was an attraction and the food refuge that was in that garbage dump and landfill were an attraction to birds of all types, and that the birds that accumulated around that landfill and thus on the airport were in tremendously large numbers and created a hazard greater than is normally found around an airport where there is no such activity, that this became an attraction to birds, it [999] created during daylight hours often many flocks of birds.

The Court finds that everyone involved in this case was aware of the problem. There is not doubt in the Court's mind that DeKalb County personnel, including its County Commissioners, its airport manager and other employees were familiar with the problem that existed there. There is no doubt in the Court's mind that air traffic control personnel and tower employees who were air traffic controllers were fully aware of the problem and hazard that existed regularly and more seriously in the winter months, that is, January, February and March, than in other times of the year, but were fully aware of the problem.

[1000] There is no doubt in the Court's mind and the Court finds that the FAA personnel in its district offices in Atlanta were fully aware of the problem and had investigated it and had negotiated with DeKalb County and had endeavored through friend coercion to eliminate the problem.

There is no doubt in the Court's mind that most people who were regularly utilizing the airfield were familiar with the problem, and particularly the decedent in this case, Ernest Sellfors, was aware of the bird problem, this being home station for him, and that on the day in issue he had taken off earlier in the morning and had landed later on that morning and this was his second takeoff for that day.

There is no doubt in the Court's mind that the aviation flight charts for this airfield contained a warning that there was a bird danger here and that those flight charts were in the possession of the deceased pilot, and in fact, were found in the wreckage of the aircraft, that is, the Jeppeson charts.

Now, on the particular day in issue there were birds sighted on the field and of which the air traffic controllers were aware [1001] and of which the airport manager was aware and by which he, by use of shotgun, attempted to remove and scare away from the field. This incident occurred at approximately 9:00 o'clock in the morning adjacent to Runway 16.

The birds were frightened away from this location, several killed, and others flew in a northerly direction away from the airfield. The airport manager at that time inspected the active runway, Runway 20 left, and the evidence is there were no bird sightings near that runway.

By the Court's findings the locations of the birds that were frightened away would be approximately one-quarter of a mile from Runway 20 left.

The airport manager crossed the runways returning, after making radio communications with the tower concerning bird sightings, and crossed back to the field in

the vicinity of a place where birds were later sighted that morning, and in the vicinity of where rotation, that is, takeoff, of the Learjet in issue occurred.

At this time the airport manager saw no birds along the active runway, that is, 20 [1002] left. The tower reported seeing no birds in that area at any time on that morning. That runway had been utilized substantially earlier that morning by Mr. Sellfors when he took off for a flight to Ashland, Kentucky, and when he returned at approximately 9:30 in round figures, approximately 9:30, and landed on that runway, which time was after the inspection by the airport manager.

There was a fairly active amount of traffic on that runway that morning and at no time was there reports by anyone of birds in the vicinity of that runway.

At approximately two minutes prior to the clearance for takeoff of the Learjet in issue, a pilot, a Mr. Knight, took off in a Bonanza on the same runway and sighted approximately 15 birds, I have forgotten whether he said 10 to 15 or 15 to 20, but a relatively small flock as compared to the normal hazard as reported on the left or east side of Runway 20 left near the intersection of that runway with Runway 9. These birds, he stated, flew up about the level of his wing and sat back down in the grass as he passed on the runway.

[1003] Mr. Knight made no report of this bird sighting to the tower or to anyone else, but flew away from the field without ever reporting it to anyone.

From the evidence, this is the only reported sighting of birds on or near Runway 20 left that morning prior to the incident in issue. That location would be somewhere in excess of between 1,000 and 1500 feet from the control tower and closer to a half a mile from the

point where the pilot, Sellfors, was waiting on the taxi pad for takeoff.

Approximately two minutes later and at about 10:10 a.m. Mr. Sellfors was cleared for takeoff and in fact proceeded his roll down Runway 20 left, made rotation at just beyond mid-runway, just beyond the intersection of Runway 9, and apparently ingested birds at an altitude of between 100 and 200 feet before reaching the end of the runway at which time the control tower observed black smoke or something black emanating from the left engine of the Learjet.

The Learjet proceeded to pull to the right and lose altitude, crashing approximately [1004] two miles from the airport; the pilot, Ernest Sellfors, and others being killed in that crash.

Now, the spoilers which was found to be in an up position indicating that at some time the spoilers or flaps had been extended.

I mentioned DeKalb County and I mentioned Mr. Knight, who under instructions contained in flight manuals should have made a report of the bird sightings and did not.

The Court finds that there was no evidence of negligence of air traffic controllers in failing to warn of any birds for there is no evidence that they sighted any birds whatsoever near Runway 20 left at any time on that morning, or certainly at any time approximating the time of takeoff of the Learjet.

The Court finds there was no evidence of negligence on the part of the pilot in failing to observe any birds. Certainly he was not in as good a position to observe birds as were the air traffic controllers. The air traffic

controllers were higher and closer to the part of the runway where the birds that were there had been sighted by another pilot and where apparently birds were ingested into the engine. [1005] The pilot, Mr. Sellfors, was not in as good a position, being closer to the ground and at the end of the runway and approximately twice the distance from that area as the air traffic controllers.

The Court finds there was no negligence on the part of the pilot in the takeoff procedures or otherwise and discounts completely the Government's contentions concerning contributory negligence and/or comparative negligence.

As I said before, everyone was knowledgeable about the birds, the general condition of birds, but no one appeared to have specific knowledge concerning birds on that particular date with possible exception of the pilot named Knight who took off in a Bonanza at about 10:08. After his takeoff another plane landed and made no bird report.

Now, the issue becomes whether or not the FAA through its employees and agents was negligent in failing to take sufficient corrective action to require DeKalb County to close that dump or to institute certain safety precautions as to eliminate or minimize [1006] the general condition as related to birds on the airport.

[1007] Now, the Court will note that all airports have some birds on them and it is a condition that God has created and that man can't eliminate around an open space. The issue here is not normal bird concentration but greater than normal bird concentration as being attracted by a garbage dump.

The Government relies upon the discretionary function argument, stating there is, therefore, no liability on

the part of the Government since this was a discretionary act.

The Court is concerned with this, and while the Plaintiff has not argued it, I want to embrace it before some final decision is made in this case, that after the Government has recognized a problem, this is not like some of the cases counsel has cited where there was a failure to inspect, the Government was fully aware of the hazard here, fully knowledgeable of the condition that existed and had through all of the evidence attempted to do something about it, even though what had been done was not adequate to eliminate the problem.

They had had negotiations but had taken [1008] no corrective action other than friendly coercion and had received a promise to correct the situation, which promise, if fulfilled, would have occurred before the date of this accident; that is, by August 1, 1972, but DeKalb County failed to correct the situation at that time and there is no indication that between August 1 of 1972 and February 26th, 1973, that the United States Government did anything to follow up on the broken promise.

Now, once the Government has undertaken to try to correct a situation the Court is concerned as to what their duty is, to use all of the power and authority available to them to assure that it is corrected. I have doubts that that changes the situation, it may still be a discretionary function, but under the facts as I see them it may well require a judgment for the Defendant, but if the law is such that there is any obligation or responsibility upon the FAA to pursue it more diligently than they did, then I have more grave concerns about it and I am going to leave that part open to further briefing.

I believe you said last Friday, both [1009] of you would like to brief the issue concerning discretionary function further.

I fully recognize the cases that have been reported in that regard, but that is the issue that concerns me the most, as I indicated to you before, I have grave concern about the case, but liability for the death or injury of a person arises only when there is a duty for someone to perform and that duty has been breached.

As I see it, the duty, if any, that has been breached here was only by the County and one pilot.

Now, there may be some duty as to correction of the situation that existed there, but my personal feeling is that the Government should have done something more than they did, but if the law is such as to protect the Federal Government in this case, the Court will so rule; but if the law is such as to protect the individual in this case, the Court will so rule.

I know the findings are not particularly to the liking of the Plaintiff, and I don't ask them to say that they are, but they are [1010] as I see them, and the evidence in my opinion strongly supports this finding. They are not intended at this time to be final findings; I will reduce a written order in a lot more positive form and file it.

Now, is there anything further either of you wish to ask for before we terminate this trial?

MR. SIMPSON: Nothing, Your Honor. Thank you.

THE COURT: I think I have covered everything that needs to be covered in it except that one issue, is that not right, Mr. Simpson?

MR. SIMPSON: Yes, Your Honor.

THE COURT: All right.

APPENDIX D

(Filed September 30, 1980)

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL NO. C74-1069A

MARILYN JOYCE SELLFORS

vs.

UNITED STATES OF AMERICA

ORDER

The plaintiff Marilyn Joyce Sellfors commenced this action against, among others, the United States under the Federal Tort Claims Act, 28 U.S.C.A. §§ 2671-2680, to recover the value of the life of her deceased husband, Ernest Sellfors, who was killed on February 26, 1973, when the Lear jet model 24, registration number N454RN, he was piloting crashed shortly after takeoff from DeKalb-Peachtree Airport in Chamblee, Georgia. The crash of the plane was caused by a sudden loss of thrust during takeoff when its engines ingested birds frightened into flight by the approach of the plane down the runway. The source of the birds' attraction to the airport was a landfill located on county property near the end of this runway. The plaintiff alleged that the United States was negligent in permitting use of the airport when the considerable danger posed by bird strikes was acknowledged and in neglecting to warn airmen of this known hazard.

A bench trial of the issues raised by the plaintiff's complaint was begun on May 5, 1980. At the conclusion of the trial the court held from the bench that the Federal Aviation Administration [FAA] air traffic controllers were not negligent in failing to warn the plaintiff before takeoff of the birds, since there was no evidence that they had sighted any birds immediately prior to the accident. The court, however, reserved decision on whether the FAA was negligent in failing to require DeKalb County to close the landfill and in neglecting to implement additional safety precautions to mitigate the danger presented by the flocks of birds congregating near the runways. During the course of the trial a substantial amount of testimony was introduced by the plaintiff to show that the FAA was aware of this hazard and had attempted on several occasions to persuade DeKalb County to discontinue use of the landfill but had neglected to undertake any further action on its own to abate the hazard. In its post-trial brief the United States does not deny that it was aware of this danger, but it instead argues that the court does not have subject matter jurisdiction over this suit and that the plaintiff has failed to state a claim under the Federal Tort Claims Act [FTCA]. The government's argument is two-pronged, but both elements are predicated upon the express limitations upon the waiver of sovereign immunity effected by Congress' enactment of the FTCA. The United States contends that the FAA was under no duty of care the breach of which might be actionable under this statute, but that even if such a duty was imposed, the acts or omissions complained of fall within the discretionary function exception to its tort liability under 28 U.S.C.A. § 2680(a). The government's reliance upon these two arguments places the court in an unusual position, since these same arguments were asserted by the government over five years ago in a

motion for partial summary judgment denied by the court. In making this initial motion the United States argued that it owed no actionable duty to the plaintiff to abate or mitigate the danger created by the presence of the birds near the runways. In an order entered March 25, 1975, the court rejected this argument, ruling instead that the Airport and Airway Development Act of 1970, 49 U.S.C.A. § 1701-1742, "imposed upon the United States the duty to exercise reasonable care to mitigate the 'airport hazard' alleged to exist at the DeKalb-Peachtree Airport." *Fireman's Fund Insurance Co. v. United States,* No. C74-24A, slip op. at 4 (N.D. Ga. March 25, 1975). The court also rejected the government's alternative argument that the discretionary function exception encompassed the complained-of actions or omissions at the airport. Relying upon *Dalehite v. United States,* 346 U.S. 15 (1953), and *Fair v. United States,* 234 F.2d 288 (5th Cir. 1956), the court ruled that the acts or omissions alleged to be negligent in this case were operational in character, not policy decisions, and thus could be the basis for holding the government liable under the FTCA. Presented with the rare opportunity of reviewing its own rulings in light of more recent discussions of the same issues, the court concludes in this moment of sober second thought that its previous order was not an entirely accurate statement of the law and should be modified to comport with what the court concludes was the intention of Congress in enacting the FTCA. Having registered its misgivings about this earlier order, the court is compelled to enter judgment for the United States on all the claims asserted by the plaintiff.

A necessary condition to recovery under the FTCA is the existence of a "negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances

where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C.A. § 1346(b); *see* 28 U.S.C.A. § 2674. Here the court must look to the law of Georgia. The central question, then, is whether Georgia would recognize this cause of action if the United States was a private person. The plaintiff argues that the government's duty to mitigate this hazard springs from one of three sources. The first is section 18 of the Airport and Airway Development Act of 1970, 49 U.S.C.A. § 1718, which requires the government to obtain assurances from any airport receiving federal funds that the aerial approaches to the airport will be cleared and protected and that land adjacent to the airport will be used only for purposes compatible with customary airport operations. 49 U.S.C.A. § 1718(3), (4). It is undisputed that the DeKalb-Peachtree Airport received federal funds pursuant to grant agreements in which the county expressly agreed to operate and maintain the airport in a safe and serviceable condition. In its order of March 25, 1975, the court ruled that as a matter of law this section imposed a duty upon the FAA to mitigate the hazard to aircraft created by the birds' presence at the DeKalb-Peachtree Airport. This conclusion, however, does not dispose entirely of the government's counterargument that no duty actionable under the FTCA is created by section 1718, since the determining factor is not whether a federal statutory duty can be found but whether under the same circumstances a private person would be liable under Georgia law. Recognizing this distinction, the plaintiff argues that under Georgia law the violation of a statute proximately causing injury to an individual constitutes negligence per se when the injured person falls within the class of persons the statute was intended to protect and when the harm complained of is the same the statute was

intended to prevent. *See Teague v. Keith*, 214 Ga. 853 (1959); *Peek v. Miller*, 119 Ga. App. 138 (1969); *Rhodes v. Baker*, 116 Ga. App. 157 (1967). *See also* W. Prosser, *Law of Torts* § 36, at 190 (4th ed. 1971). Even assuming that this statute imposed a duty on the FAA to obtain these assurances before disbursing these funds and in neglecting to do this or in failing to do more than to attempt to persuade DeKalb County to remedy the bird hazard this duty was breached, the court, however, does not agree that the United States can be held liable under the FTCA on a negligence per se theory. Though the court is aware of cases in which tort liability was imposed upon the government under what appears to be the negligence per se doctrine, *e.g., Griffin v. United States*, 500 F.2d 1059 (3d Cir. 1974); *Underwood v. United States*, 356 F.2d 92 (5th Cir. 1966); *Reminga v. United States*, 448 F. Supp. 445 (W.D. Mich. 1978); *Betesh v. United States*, 400 F. Supp. 238 (D.D.C. 1974), none of these cases concern the statute at issue here, and none construe the law of Georgia on this issue. The plaintiff, however, has cited two cases, *Rapp v. Eastern Air Lines, Inc.*, 264 F. Supp. 673 (E.D. Pa. 1967), *vacated by agreement*, 521 F.2d 1399 (3d Cir. 1970), and *Starr v. United States*, 393 F. Supp. 1359 (N.D. Tex. 1975), in which the court indicated that the breach of the duty imposed on the government by the Airport and Airway Development Act of 1970 was actionable under the FTCA. In *Rapp* the court expressly held that this statute imposed a duty upon the government to ensure that the aerial approaches to Logan Airport in Boston, Massachusetts remained clear and that the failure to do this constituted actionable negligence. In *Starr* the court cited the holding in *Rapp* with approval but distinguished this case on the ground that the airport in question did not receive any federal funds. The court, however, disagrees that tort liability under the FTCA can be predicated upon the gov-

ernment's alleged failure to comply with the dictates of the Airport and Airway Development Act of 1970. Though section 18 of this statute, 49 U.S.C.A. § 1718, may impose a duty upon the government to obtain these assurances before disbursing federal funds and though section 27, 49 U.S.C.A. § 1727, may grant the Secretary of Transportation the authority to enforce these assurances, the court does not believe that the failure to obtain assurances or the failure to enforce them once they were given is actionable under the FTCA. To begin with, under the FTCA the government has waived its sovereign immunity only as to those torts recognized under state law. The legislative history of this statute indicates that Congress was most concerned with creating a remedy for ordinary common law torts committed by government employees. *E.g.*, H.R. Rep. No. 2800, 71st Cong., 3d Sess. p. 13. There is no evidence that it also intended to abolish immunity for every violation of a federal statutory duty. Taken to its logical extreme, the plaintiff's argument is likely to compel precisely this result. By statute, the government is obligated to provide a variety of services affecting a broad spectrum of groups and individuals. To open up the possibility of tort liability to every individual within the broad scope of this legislative mandate is contrary to the purpose of the FTCA. Congress enacted the Airport and Airway Development Act of 1970 to spur the development and improvement of airports and airway networks in order that these critical operations could be expanded quickly enough to keep pace with the demand placed on these services by a burgeoning population, but nowhere in this statute or in its legislative history is there any indication that in enacting this legislation Congress intended to impose upon the FAA or the Secretary of Transportation the duty to supervise all phases of the airport operation to ensure that the airport was run safely. *See* [1970] U.S. Code Cong.

and Ad. News 3047. Though one purpose of this statute may have been to promote safe air travel, the Act does not create a legal duty actionable under the FTCA to implement specific protective measures for the benefit of a particular class of persons. To receive these grants of federal money the applicant had to assure the Secretary that the airport would be operated safely. The plaintiff contends that the defendant either failed to insist upon these assurances or to force the county to honor these commitments once they were given. But even if this statute does impose such a duty, this cause of action is not one that would be asserted against a private person under Georgia law and therefore cannot be maintained under the FTCA. *See United Scottish Insurance Co. v. United States,* 614 F.2d 188 (9th Cir. 1979); *Gelley v. Astra Pharmaceutical Products, Inc.,* 610 F.2d 558 (8th Cir. 1979); *Zabala Clemente v. United States,* 567 F.2d 1140 (1st Cir. 1977), *cert. denied,* 435 U.S. 1006 (1978); *Baker v. F&F Investment Co.,* 489 F.2d 829 (7th Cir. 1973); *Devlin Lumber and Supply Corp. v. United States,* 488 F.2d 88 (4th Cir. 1973); *United States v. Smith,* 324 F.2d 622 (5th Cir. 1963); *Blessing v. United States,* 447 F. Supp. 1160 (E.D. Pa. 1978); *In re Franklin National Bank Securities Litigation,* 445 F. Supp. 723 (E.D.N.Y. 1978); *Maffei v. Nieves-Reta,* 412 F. Supp. 43 (S.D. Cal. 1976), *aff'd,* 549 F.2d 807 (9th Cir. 1977); *Davis v. United States,* 395 F. Supp. 793 (D. Neb. 1975), *aff'd,* 536 F.2d 758 (8th Cir. 1976). *See also Tanner v. Rebel Aviation, Inc.,* 146 Ga. App. 110 (1978).

The plaintiff, however, also argues that liability under the FTCA can be predicated upon the FAA's assumption of the responsibility of staffing and operating the air traffic control tower at the airport. She argues that even though the court has already held that the air traffic con-

trollers were not negligent in clearing the jet for takeoff, they could still be held liable for their negligent failure to devise any safety precautions to minimize the probability of an accident such as that which occurred on February 26, 1973, once the FAA had undertaken control of the tower. Under Georgia law, the plaintiff contends, an individual who gratuitously undertakes to render a service for another, which he recognizes to be necessary for the other's protection, and thereby induces reliance is liable for the harm proximately caused by his failure to exercise due care. *Mixon v. Dobbs Houses, Inc.*, 149 Ga. App. 481 (1979); *Shirley Cloak & Dress Co. v. Arnold*, 92 Ga. App. 885 (1955). In *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), a suit brought under the FTCA, the Supreme Court concluded that the Coast Guard could be held liable under the FTCA for negligent operation of a lighthouse once it undertook to provide this service and thereby engendered reliance. This same principle has been applied to hold air traffic controllers answerable for their negligence in directing pilots to hazardous landings or in failing to warn pilots of potential hazards in the area. *E.g., Delta Air Lines, Inc. v. United States*, 561 F.2d 381 (1st Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Yates v. United States*, 497 F.2d 878 (10th Cir. 1974); *Spaulding v. United States*, 455 F.2d 222 (9th Cir. 1972); *Gill v. United States*, 429 F.2d 1072 (5th Cir. 1970); *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967). The court has already concluded that the air traffic controllers were not negligent in failing to warn the deceased pilot before takeoff of the presence of birds. This conclusion necessarily disposes of the plaintiff's argument that the tower employees were negligent in continuing to clear planes for landings on and departures off of this runway, notwithstanding their awareness of the danger created by the birds. Therefore, the only re-

maining basis for liability could be the FAA's breach of a duty owing to the plaintiff to minimize or abate this hazard through the implementation of additional safety precautions. The court, however, does not believe that the United States may be held liable under the FTCA for failing to devise more effective or additional regulations governing air traffic at the DeKalb-Peachtree Airport. Under 28 U.S.C.A. § 2680(a), the government's sovereign immunity is not waived as to any claim based upon "the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." This qualification to the United States' tort liability under the FTCA has been interpreted to except liability for all acts of discretion in the performance of governmental functions. *See Dalehite v. United States,* 346 U.S. 15 (1953). In its order of March 25, 1975, in which the court first rejected the government's discretionary function argument, the court did not specifically address the issue whether this exception encompasses the alleged failure to implement additional safety precautions, but having reviewed the cases cited by each party and the responsibilities and authority of the FAA, the court concludes that the authority to impose additional conditions upon air traffic or to further restrict the use of the airport is a function committed to the sound discretion of the FAA and therefore under section 2680(a) cannot be the basis for liability under the FTCA. In a number of cases courts have held that the rulemaking authority of federal agencies does constitute a discretionary function and that, consequently, the failure to implement new regulations or to revise existing ones cannot be the subject of a FTCA action. *E.g., Miller v. United States,* 378 F. Supp. 1147 (E.D. Ky. 1974), *aff'd,* 522 F.2d 386 (6th Cir. 1975); *see Dalehite v. United States,*

346 U.S. 15 (1953). The decision whether to further restrict use of the DeKalb-Peachtree Airport is infused with the same type of policy considerations that Congress intended federal agencies to weigh without the fear of tort liability under the FTCA.

The foregoing shall constitute the court's findings of fact and conclusions of law in accordance with rule 52(a) of the Federal Rules of Civil Procedure. Accordingly, the court hereby directs the clerk to enter judgment on all the plaintiff's claims in favor of the defendant.

IT IS SO ORDERED this 30th day of September, 1980.

/s/ William C. O'Kelley
William C. O'Kelley
United States District Judge

APPENDIX E

(Filed September 30, 1980)

UNITED STATES DISTRICT COURT
For the Northern District of Georgia
Atlanta Division

Civil Action File No. C74-1069A

MARILYN JOYCE SELLFORS, Widow of Ernest Frederickson Sellfors, deceased

vs.

UNITED STATES OF AMERICA

JUDGMENT

This action came on for consideration before the Court, Honorable William C. O'Kelley, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, finding for the defendant and against the plaintiff. It is Ordered and Adjudged that the plaintiff MARILYN JOYCE SELLFORS take nothing, the action be dismissed and that defendant UNITED STATES OF AMERICA recover cost of action.

Dated at Atlanta, Georgia, this 30th day of September, 1980.

Ben H. Carter
Clerk of Court
By /s/ Claudia Phillips
Deputy Clerk

APPENDIX F

RELEVANT SECTIONS OF THE AIRPORT AND AIRWAY DEVELOPMENT ACT, 49 U.S.C. §§1701 *et seq.*

§1711 DEFINITIONS

As used in this subchapter-

. . .

(4) "Airport hazard" means any structure or object of natural growth located on or in the vicinity of a public airport, or any use of land near such airport, which obstructs the airspace required for the flight of aircraft in landing or taking off at such airport or is otherwise hazardous to such landing or taking off of aircraft. . . .

§1714 AIRPORT AND AIRWAY DEVELOPMENT PROGRAM

General Authority

(a) In order to bring about, in conformity with the national airport system plan, the establishment of a nationwide system of public airports adequate to meet the present and future needs of civil aeronautics, the Secretary is authorized to make grants for airport development by grant agreements with sponsors in aggregate amounts not less than the following:

(1) For the purpose of developing in the several States, the Commonwealth of Puerto Rico, Guam, American Samoa, The Trust Territory of the Pacific Islands, and the Virgin Island, airports served by air carriers certificated by the Civil Aeronautics Board,

and airports the primary purpose of which is to serve general aviation and to relieve congestion at airports having a high density of traffic serving other segments of aviation, $250,000,000 for each of the fiscal years 1971 through 1973, and $275,000,000 for each of the fiscal years 1974 and 1975.

(2) For the purpose of developing in the several States, the Commonwealth of Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, airports serving segments of aviation other than air carriers certificated by the Civil Aeronautics Board, $30,000,000 for each of the fiscal years 1971 through 1973, and $35,000,000 for each of the fiscal years 1974 and 1975. . .

(4) For the purpose of developing general aviation airports in the several States, the Commonwealth of Puerto Rico, Guam, American Samoa, the Trust Territory of the Pacific Islands, and the Virgin Islands, $65,000,000 for fiscal year 1976, including the period July 1, 1976, through September 30, 1976, $70,000,000 for fiscal year 1977, $75,000,000 for fiscal year 1978, $80,000,000 for fiscal year 1979, $98,000,000 for fiscal year 1980, and $63,000,000 for fiscal year 1981. . .

§1718 PROJECT SPONSORSHIP REQUIREMENTS; COMPLIANCE; CONTRACTS BETWEEN SECRETARY AND PUBLIC AGENCIES; AIR TRAFFIC CONTROL ACTIVITIES; RELIEF OF SPONSORS; CONSULTATION

(a) As a condition precedent to his approval of an airport development project under this subchapter, the Secretary shall receive assurances in writing, satisfactory to him, that—

PUBLIC USE; REQUIREMENTS

(1) the airport to which the project for airport development relates will be available for public use on fair and reasonable terms and without unjust discrimination, including the requirement that (A) each air carrier, authorized to engage directly in air transportation pursuant to section 1371 or 1372 of this title, using such airport shall be subject to nondiscriminatory and substantially comparable rates, fees, rentals, and other charges and nondiscriminatory and substantially comparable rules, regulations, and conditions, as are applicable to all such air carriers which make similar use of such airport and which utilize similar facilities, subject to reasonable classifications such as tenants or nontenants, and combined passenger and cargo flights or all cargo flights, and such classification or status as tenant shall not be unreasonably withheld by any airport provided an air carrier assumes obligations substantially similar to those already imposed on tenant air carriers, and (B) each fixed-based operator using a general aviation airport shall be subject to the same rates, fees, rentals, and other charges as are uniformly applicable to all other fixed-based operators making the same or similar uses of such airport utilizing the same or similar facilities;

MAINTENANCE AND OPERATION

(2) the airport and all facilities thereon or connected therewith will be suitably operated and maintained, with due regard to climatic and flood conditions;

AIRPORT HAZARDS

(3) the aerial approaches to the airport will be adequately cleared and protected by removing, lower-

ing, relocating, marking, or lighting or otherwise mitigating existing airport hazards and by preventing the establishment or creation of future airport hazards;

COMPATIBLE USE OF ADJACENT LAND

(4) appropriate action, including the adoption of zoning laws, has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations, including landing and takeoff of aircraft;

GOVERNMENT USE; CHARGE

(5) all of the facilities of the airport developed with Federal financial assistance and all those usable for landing and takeoff of aircraft will be available to the United States for use by Government aircraft in common with other aircraft at all times without charge, except, if the use by Government aircraft is substantial, a charge may be made for a reasonable share, proportional to such use, of the cost of operating and maintaining the facilities used;

AIR TRAFFIC CONTROL ACTIVITIES

(6) the airport operator or owner will furnish without cost to the Federal Government for use in connection with any air traffic control activities, or weather-reporting and communication activities related to air traffic control, any areas of land or water, or estate therein, or rights in buildings of the sponsor as the Secretary considers necessary or desirable for construction at Federal expense of space or facilities for such purposes;

ACCOUNTING

(7) all project accounts and records will be kept in accordance with a standard system of accounting prescribed by the Secretary after consultation with appropriate public agencies;

SELF-SUSTAINING FEE AND RENTAL STRUCTURE

(8) the airport operator or owner will maintain a fee and rental structure for the facilities and services being provided the airport users which will make the airport as self-sustaining as possible under the circumstances existing at that particular airport, taking into account such factors as the volume of traffic and economy of collection, except that no part of the Federal share of an airport development project for which a grant is made under this chapter or under the Federal Airport Act shall be included in the rate base in establishing fees, rates, and charges for users of that airport;

REPORTS

(9) the airport operator or owner will submit to the Secretary such annual or special airport financial and operations reports as the Secretary may reasonably request; and

INSPECTION OF RECORDS

(10) the airport and all airport records will be available for inspection by any duly authorized agent of the Secretary upon reasonable request.

To insure compliance with this section, the Secretary shall prescribe such project sponsorship requirements, consistent with the terms of this subchapter, as he considers necessary. Among other steps to insure such compliance the Secretary is authorized to enter into contracts with public agencies, on behalf of the United States. Whenever the Secretary obtains from a sponsor any area of land or water, or estate therein, or rights in buildings of the sponsor and contracts space or facilities thereon at Federal expense, he is authorized to relieve the sponsor from any contractual obligation entered into under the subchapter or the Federal Airport Act to provide free space in airport buildings to the Federal Government to the extent he finds that space no longer required for the purposes set forth in paragraph (6) of this subsection.

(b) In making a decision to undertake any project under this chapter, any sponsor of an air carrier airport shall consult with air carriers using the airport at which such airport development project is proposed and any sponsor of a general aviation airport shall consult with fixed-based operators using the airport at which such airport development project is proposed.

§1727 GENERAL POWERS OF SECRETARY

The Secretary is empowered to perform such acts, to conduct such investigations and public hearings, to issue and amend such orders, and to make and amend such regulations and procedures, pursuant to and consistent with the provisions of this subchapter, as he considers necessary to carry out the provisions of, and to exercise and perform his powers and duties under, this subchapter.

FEDERAL TORT CLAIMS ACT,

28 U.S.C. §§2671-2680

§2671. DEFINITIONS

As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.

"Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the services of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

§2672. ADMINISTRATIVE ADJUSTMENT OF CLAIMS

The head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting

within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: PROVIDED, That any award, compromise, or settlement in excess of $25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

Subject to the provisions of this title relating to civil actions on tort claims against the United States, any such award, compromise, settlement, or determination shall be final and conclusive on all officers of the Government, except when procured by means of fraud.

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

The acceptance by the claimant of any such award, compromise, or settlement shall be final and conclusive on the claimant, and shall constitute a complete release of any claim against the United States and against the employee of the government whose act or omission gave rise to the claim, by reason of the same subject matter.

§2673. Repealed.

§2674. LIABILITY OF UNITED STATES

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

§2675. DISPOSITION BY FEDERAL AGENCY AS PREREQUISITE; EVIDENCE

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section. The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counterclaim.

(b) Action under this section shall not be instituted for any sum in excess of the amount of the claim presented to the federal agency, except where the increased amount is based upon newly discovered evidence not reasonably discoverable at the time of presenting the claim to the federal agency, or upon allegation and proof of intervening facts, relating to the amount of the claim.

(c) Disposition of any claim by the Attorney General or other head of a federal agency shall not be competent evidence of liability or amount of damages.

§2676. JUDGMENT AS BAR

The judgment in an action under section 1346(b) of this title shall constitute a complete bar to any action by the claimant, by reason of the same subject matter, against the employee of the government whose act or omission gave rise to the claim.

§2677. COMPROMISE

The Attorney General, with the approval of the court, may arbitrate, compromise, or settle any claim cognizable under section 1346(b) of this title, after the commencement of an action thereon.

§2678. ATTORNEY FEES; PENALTY

No attorney shall charge, demand, receive, or collect for services rendered, fees in excess of 25 per centum of any judgment rendered pursuant to section 1346(b) of this title or any settlement made pursuant to section 2677 of this title, or in excess of 20 per centum of any award, compromise, or settlement made pursuant to section 2672 of this title.

Any attorney who charges, demands, receives, or collects for services rendered in connection with such claim any amount in excess of that allowed under this section, if recovery be had shall be fined not more than $2,000 or imprisoned not more than one year, or both.

§2679. EXCLUSIVENESS OF REMEDY

(a) The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under section 1346(b) of this title, and the remedies provided by this title in such cases shall be exclusive.

(b) The remedy against the United States provided by sections 1346(b) and 2672 of this title for injury or loss of property or personal injury or death, resulting from the operation by any employee of the Government of any motor vehicle while acting within the scope of his office or employment, shall hereafter be exclusive of any other civil action or proceeding by reason of the same subject matter against the employee or his estate whose act or omission gave rise to the claim.

(c) The Attorney General shall defend any civil action or proceeding brought in any court against any employee of the Government or his estate for any such damage or injury. The employee against whom such civil action or proceeding is brought shall deliver within such time after date of service or knowledge of service as determined by the Attorney General, all process served upon him or an attested true copy thereof to his immediate superior or to whomever was designated by the head of his department to receive such papers and such person shall promptly furnish copies of the pleadings and

process therein to the United States attorney for the district embracing the place wherein the proceeding is brought, to the Attorney General, and to the head of his employing Federal agency.

(d) Upon a certification by the Attorney General that the defendant employee was acting within the scope of his employment at the time of the incident out of which the suit arose, any such civil action or proceeding commenced in a State court shall be removed without bond at any time before trial by the Attorney General to the district court of the United States for the district and division embracing the place wherein it is pending and the proceedings deemed a tort action brought against the United States under the provisions of this title and all references thereto. Should a United States district court determine on a hearing on a motion to remand held before a trial on the merits that the case so removed is one in which a remedy by suit within the meaning of subsection (b) of this section is not available against the United States, the case shall be remanded to the State court.

(e) The Attorney General may compromise or settle any claim asserted in such civil action or proceeding in the manner provided in section 2677, and with the same effect.

§2680. EXCEPTIONS

The provisions of this chapter and section 1346(b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise

or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for wich a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in Administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: PROVIDED, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer

of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during the time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.